HUZIR BIN HASSAN

v.

KETUA POLIS DAERAH, JOHOR BAHRU

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[CRIMINAL APPLICATION NO 44-33-1989]
28 FEBRUARY 1994

CRIMINAL PROCEDURE: Uncautioned statement made to police during detention - Whether accused entitled to statement - Discretion of Court - Justice of the case - Whether accused had sufficient notice of the charge against him - Criminal Procedure Code s. 51.

CRIMINAL PROCEDURE: Uncautioned statement - Statement recorded by police under special law relating to preventive detention - Whether production of statement prejudicial to national interest - Dangerous Drugs (Special Preventive Measures) Act 1985 ss. 4, 14.

EVIDENCE: Uncautioned statement made during detention - Whether admissible in evidence - Whether a public document - Right to inspect - Whether accused entitled to inspect statement - Section 76 Evidence Act 1950.

This was an application by the applicant for an order that the respondent furnish him with the uncautioned statement he made to the police during his detention under s. 117 CPC. The facts showed that the said statement was recorded under s. 4, Dangerous Drugs (Special Preventive Measures) Act 1985 and that the applicant was denied the document as the police felt that it was against "national interest" to supply the same by virtue of s. 14 of the Act.

At the material time the applicant was facing a trial for dangerous drugs trafficking and it was contended by the applicant that the statement was relevant to his defence in that case and hence the need for access to the same. It was also submitted that irrespective of the law under which the statement was recorded, so long as the document was a public document under s. 74 of the Evidence Act 1950, the applicant, being a person having an interest in the document, had a right to it under s. 76 of the said Act. And it was further contended that the applicant was entitled to the document under s. 51 CPC as justice of the case made it crucial that the document should be supplied to him.

Held:

[1] An uncautioned statement is inadmissible in evidence and the applicant cannot rely on it to support his defence in the pending dangerous drugs trafficking charge. The statement is thus irrelevant for his defence in that case and therefore there is no necessity of furnishing him with the statement though he may have interest in it. The relevant statement for the purpose of his defence would be the cautioned statement for which a copy has been supplied to him.

[2] It is clear that in the pending dangerous drugs trafficking charge the cautioned statement had been duly furnished to the applicant and the applicant thus had sufficient notice of the allegations made against him. In the circumstances the justice of the case had been met and the requirement of the law satisfied and therefore there is no room for the application of s. 51 CPC and hence for the supply of the said uncautioned statement to the applicant.

[3] The applicant is also not entitled to the statement by virtue of s.14 of the 1985 Act. Section 14 thereof clearly protects any public servant from producing documents which he considers to be against "national interest" to do so and the Court would be in error to ignore this express provision . As what constitues "national interest" is for the Executive and not for the Court to decide the position must be that once s. 14 of the Act is invoked the applicant can no longer be entitled to the statement in question.

[4] Section 76 of the Evidence Act presupposes the existence of a right to inspect a public document and does not by itself confer such right. The right to inspect a public document can only relate to the interest that needs to be protected. In the instant case, the uncautioned statement is inadmissible in evidence and irrelevant to the applicant's defence in the pending drugs case. There is thus no interest to be protected and therefore no right to inspect could accrue to the applicant.

[Application dismissed].

Cases referred to:

Husdi v. Public Prosecutor [1979] 2 MLJ ***(refd)***

Anthony Gomez v. Ketua Polis Daerah Kuantan [1977] 2 MLJ 24 ***(refd)***

Mutter v. Eastern and Midlands Railway Co. [LR. 38 Ch D92] ***(refd)***

Haji Abdul Ghani v. Public Prosecutor [1980] 1 MLJ 196 ***(dist)***

Public Prosecutor v. Raymond Chia Kim Swee & Anor. [1985] 2 MLJ 436 ***(foll)***
Zainal bin Haji Ali v. Public Prosecutor [1985] 2 MLJ 436 ***(foll)***
Re Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 188 ***(foll)***
B.A Rao & Ors. v. Sapuran Kaur & Anor [1978] 2 MLJ 146 ***(dist)***

Legislation referred to:
Criminal Procedure Code, ss. 51, 117
Dangerous Drugs (Special Preventive Measures) 1985, ss. 4, 6 (1) (3), 14, 39B(1)(a)
Evidence Act 1950, ss. 74, 123, 124, 157, 162

For the appellant - Teh Poh Teik; M/s Teh Poh Teik & Co.
For the respondant - A. Rashid bin Daud, DPP

JUDGMENT

Haidar bin Mohd Noor J:
In this criminal application, by way of notice of motion, Huzir bin Hassan ('the applicant') sought for an order from the Court that Ketua Polis Daerah, Polis DiRaja Malaysia, Johor Bahru ('the Respondent') do furnish to the applicant or his solicitors the uncautioned statement(s) made by the applicant to the police during the detention under s. 117 of the Criminal Procedure Code ('CPC'). The applicant filed an affidavit in support thereof.

The respondent objected to the application by way of the affidavit of Inspektor Jaafar bin Mohd. Aris of Cawangan Anti-Dadah, Ibu Pejabat Polis Kontingen, Johor (encl. 9).

It is not disputed that the applicant made two statements, one of which was cautioned and the other uncautioned (see paragraph 2 of his affidavit at encl. 2). The cautioned statement was supplied to the applicant by the respondent but the uncautioned statement was refused. The refusal, according to the affidavit of Inspektor Jaafar, was because the uncautioned statement was recorded under s. 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') and by virtue of s. 14 of the Act it would be against national interest to produce the uncautioned statement.

The applicant in this criminal application wanted the uncautioned statement on the basis that he has a right to it as he has tangible interest in it and for the purpose of his trial for dangerous drugs trafficking, which is still pending before the High Court here. Mr Teh Poh Teik, Counsel for the applicant, went on further to submit that irrespective of under whatever laws the statement is recorded so long as the applicant could prove that the statement is a public document under s. 74 of the Evidence Act 1950 and that he has a right to that document under s. 76 of the Evidence Act 1950 he is entitled to it. Sections 74 and 76 of the Evidence Act 1950 were considered by Syed Othman, F.J. in *Husdi v. Public Prosecutor* [1979] 2 MLJ where at page 306, His Lordship said:

> On the face of it a police statement falls under s. 74 of the Evidence Act, as it is a document forming the act of a public officer. Simply because a document is the act of a public officer does not give a person interested or otherwise, a right to inspect. Section 76 of the Evidence Act merely relates to the manner of certification. I**t is not an enactment which confers any right**. It presupposes the existence of the right to inspect. (underlining is mine).

However, in *Anthony Gomez v. Ketua Polis Daerah, Kuantan* [1977] 2 MLJ 24, the Federal Court in dealing with the first information report, held:

> although s. 76 of the Evidence Act is silent as to the right of a person to inspect a first information report, it is clear that **under the common law** the appellant has that right as he is a person interested in it and inspection is necessary for the protection of his interest. The first information report is admissible in evidence in the criminal trial under s. 157 of the Evidence Act and therefore the appellant or his Counsel should be supplied with a copy (underlining is mine).

The Federal Court in construing such right as common law right quoted the judgment of Lindley LJ at page 106 in *Mutter v. Eastern and Midlands Railway Co.* (LR. 38 Ch. D92)-

> Where the right to inspect and take a copy is not expessly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle ...

The purpose of the uncautioned statement according to the applicant is for his defence in a pending dangerous drugs trafficking charge and therefore it was contended that the uncautioned statement is relevant and the applicant has an interest in it and hence the right to it. With respect, I am of the view that an

uncautioned statement does not appear to be admissible (see *Husdi v. Public Prosecutor, supra*, at page 306). In the circumstances, I do not see how the uncautioned statement, though he may have interest in it, is relevant for the purpose of his defence in the pending dangerous drugs trafficking charge. The relevant statement for the purpose of his defence (and which is admissible) would be the cautioned statement for which a copy has been supplied to him. The learned Counsel for the applicant relied on the case of *Haji Abdul Ghani v. Public Prosecutor* [1980] 1 MLJ 196 to support his contention that the applicant is entitled to the uncautioned statement. With respect, the decision on this aspect is only *obiter dicta* and in any event it is distinguishable in that the uncautioned statement of the applicant was recorded under a special law relating to preventive detention and not recorded under the CPC as in Haji Abdul Ghani's case for purposes of trials in Courts. The recording of the uncautioned statement under the Act, as I said earlier, does appear to be inadmissible and the applicant cannot rely on it as his defence or to support his defence in the pending dangerous drugs trafficking charge and where then is the necessity of furnishing him with the uncautioned statement for the protection of his interest?

Besides relying on the relevant provisions of the Evidence Act 1950, the application as the heading denotes, is made under s. 51 of the CPC. Section 51 of the CPC was considered by the Federal Court in *Public Prosecutor v. Raymond Chia Kim Swee & Anor., Zainal Bin Hj. Ali v. Public Prosecutor* [1985] 2 MLJ 436 by way of criminal reference.

Section 51 of the CPC, in so far as it is relevant, reads:

> 51(1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.
>
> (ii) ...
>
> (iii) ...

This is what the Federal Court said at page 439 thereof:

> From the language of the section ("necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding") it is quite plain that an application under that section may be made before the commencement of a trial or in the course of a trial. In exercising its discretion under s. 51(1) of the Criminal Procedure Code the Court has to consider the justice of the case and at what stage of the proceeding the application is made.

Further, on the same page, the Federal Court said:

> The entitlement of the accused under s. 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. **The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied.**
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> (underlining is mine).

It would seem clear in the pending charge of dangerous drugs trafficking under s. 39B(1) (a) of the Dangerous Drugs Act 1952 against the applicant that he had sufficient notice of what is alleged against him in which the cautioned statement was duly furnished to him. In fact, the applicant may rely on his cautioned statement as a defence. In the circumstances the justice of the case would have been met and the requirement of the law was satisfied.

The object and purpose of the Act is to provide for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs which empowers the Minister, *inter alia*, if satisfied that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs and that it is in the public interest to order that such person be detained, by order, direct that such person be detained for a period not exceeding two years. The Minister may, instead of directing the person be detained, make an order imposing restrictions and conditions in respect of his activities, freedom of movement or places of residence or

employment (see sub-sections (i) and (3) of s. 6 of the Act). It would seem clear that the uncautioned statement recorded under the Act is for different object and purpose. As an uncautioned statement is inadmissible in evidence compared to the cautioned statement recorded under the Dangerous Drugs Act 1952 or the CPC, the information recorded under the Act would, in my view, be radically different. The recording of the uncautioned statement would be more from the angle of prejudice to public order and to prevent the threat of a substantial body of persons in that respect from inside and outside Malaysia as the preamble to the Act seems to indicate. I am of the opinion that it was for this purpose, that the legislature thought it fit to enact s. 14 in the Act in respect of non-disclosure of information recorded under the Act. Section 14 reads:

> Nothing in this Part or in any rules or regulations made thereunder shall require the Minister or any member of an Advisory Board or any Inquiry Officer or **any public servant** to disclose facts or to produce documents which he considers to be against the national interest to disclose or produce.
> (underlining is mine).

To my mind, what is 'national interest' is a matter for the Executive to decide and not for the Court and s. 14 of the Act clearly protects 'any public servant' from producing documents which he considers to be against 'national interest' to do so. In this respect, the Supreme Court in *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ at page 188, said:

> In such a case whilst the authority was required to hear representation from the aggrieved person, in no sense would it be bound to disclose any grounds or information which in its opinion would constitute security. This is entirely a matter for the authority concerned.

Further, on the same page the Supreme Court stated:

> The learned Judge was also in error to ignore the express provision of clause (3) of article 151 of the Constitution for by that clause the authority cannot be required to furnish facts whose disclosure would in its opinion be against national interest.

Similarly here, I would be in error to ignore the express provision of s. 14 of the Act if I were to order that the applicant be furnished with the uncautioned statement. In other words 'national interest' is the primary consideration as to whether the uncautioned statement should be furnished or not to the applicant. There has been no affidavit in reply by the applicant to the affidavit of Inspektor Jaafar that the uncautioned statement was not recorded under the Act.

The case of *B.A. Rao & Ors. v. Sapuran Kaur & Anor.* [1978] 2 MLJ 146 relied on by the applicant is not applicable as the Federal Court was dealing with ss. 123 and 162 of the Evidence Act, 1950. I would even go one step further to say that the uncautioned statement is not a document made in "official confidence" within the meaning of s. 124 of the Evidence Act 1950 (see Re Neo Guan Chye, Deceased [1935] MLJ at p. 272). There was therefore no necessity for the respondent to issue a certificate under s. 124 of the Evidence Act 1950.

In a nutshell, once s. 14 of the Act is invoked by the respondent, the applicant is not entitled to be furnished with the uncautioned statement.

In the circumstances, I am of the opinion that the uncautioned statement is not only irrelevant for the purposes as indicated by the applicant, he is not entitled to it by virtue of s. 14 of the Act. This is a proper case where the Court should decline to exercise its discretion (even if it has) having regard to the justice of the case and as stated by the *Federal Court in Public Prosecutor v. Raymond Chin Kian Swee & Anor. supra,* at page 439:

> If the discretion is to be exercised before the commencement of trial the Court cannot anticipate how the prosecution will proceed. In other words the Court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under s. 51 of the Criminal Procedure Code.

The application is accordingly dismissed.